

## APPEAL NO. 93196

On January 27, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues at the contested case hearing were whether appellant (carrier) timely contested compensability of the claim on the basis that the respondent signed a waiver of coverage under TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act) and whether the Texas Workers' Compensation Commission (Commission) has jurisdiction over this claim.

The hearing officer concluded that the Commission had jurisdiction in this case and that the carrier had waived its right to contest compensability. The hearing officer based his conclusion upon findings that the respondent, (claimant), did not know he was rejecting workers' compensation coverage when he executed a form which was checked as rejecting workers' compensation coverage (form) and that the carrier did not contest compensability of the claimant's injury on or before the 60th day after being notified of the injury. The hearing officer also ruled that no authority exists for allowing carrier to reopen the issue of compensability, finding that carrier could have reasonably discovered the form prior to approximately seven months after the date of injury.

The carrier argues that the Commission has no jurisdiction over this case because the claimant opted out of the 1989 Act. Carrier further contends that its failure to timely contest the claim is irrelevant because jurisdiction cannot be created by estoppel or mistake.

The claimant responds that the Commission has jurisdiction to determine whether or not the claimant rejected workers' compensation coverage. The claimant also submits that the Commission has jurisdiction to determine whether the carrier waived the defense that claimant had opted out of the 1989 Act by its failure to timely raise the issue.

## DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

The claimant testified that he was hired by (employer) on January 21, 1992. He also testified that on the same day he was called into the break room by (Ms. S), who was established by later evidence to be the employer's safety director, to sign some employment documents. Included among these documents was the form which reads as follows:

### **WORKERS' COMPENSATION INSURANCE COVERAGE**

[Employer], and its affiliates and subsidiaries has workers' compensation insurance coverage from [insurance company] to protect you. You can get more information about your workers' compensation rights from any office

of the Texas Workers' Compensation Commission, or by calling 1-800-252-7031.

You may elect to retain your common law right of action if, no later than five days after beginning employment, you notify [employer] in writing that you wish to retain your common law right to recover damages for personal injury. If you elect your common law right of action, you cannot obtain workers' compensation income or medical benefits if you are injured.

Accepts Workers' Compensation Benefits  
 Rejects Workers' Compensation Insurance Benefits

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_  
Printed Name of Employee

\_\_\_\_\_  
Date

(Note: This form is to be filed in the Employee's Personnel File.)

Claimant testified that he did not recall signing this form, and did not read it, but he stated when presented with this form at the hearing that his signature appears on it. Claimant also said that even though he does not remember checking it off, the line on the form was checked next to "Rejects Workers' Compensation Benefits." The form was dated "1-21-92."

Claimant stated that on January 21, 1992, he signed five or six employment or insurance documents. He stated that no one explained to him what he was signing, that he did not know what he was signing, that no one explained to him what rejecting benefits meant, and that he does not believe he rejected workers' compensation coverage. Claimant further reiterated that, while he can read and write English, he did not read this form.

Ms. S testified that she assisted claimant in filling out his employment and insurance documents. She stated that she explained each document to claimant, and she told him if he signed the form rejecting workers' compensation benefits, and was later

injured, his only recourse would be to take the company to court. Ms. S also testified that even though she gave the claimant an opportunity to read the form, he did not read it. Ms. S said that while she has assisted many employees, including 60 of employer's present 90 employees at its division, in filling out the same paperwork, claimant was the only employee she ever recalled who rejected workers' compensation coverage. Ms. S further explained that once all the employment documents, including the form, were filled out, they were maintained in each employee's personnel file in city and copies were sent to employer's office where they were maintained in a duplicate personnel file.

Claimant, who worked as a mechanic, injured his left shoulder on (date of injury), while working for employer. On April , 1992, Ms. S filled out an employer's first report of injury. She testified that while she was aware of the form being in the claimant's personnel file, she had forgotten that he had waived coverage. She then mailed the employer's first report of injury to the employer's Houston office and to the Texas Workers' Compensation Commission. A Payment of Compensation or Notice of Refusal/Disputed Claim (TWCC-21) dated May 27, 1992, which was admitted into evidence, states that carrier first received written notice of claimant's injury on May 4, 1992. Ms. S testified that while she has sometimes been contacted by the carrier in other workers' compensation claims, when the carrier felt she had knowledge of something the carrier needed to know, she was not contacted in this case.

Claimant received weekly workers' compensation income and medical benefits from the carrier from April to October, 1992. Around October 20, 1992, (Mr. R), employer's benefit manager, brought to Ms. S's attention that claimant had signed the form with the line rejecting workers' compensation coverage checked. On October 20, 1992, Mr. R sent a letter to carrier stating that claimant had rejected workers' compensation benefits on January 21, 1993. On October 21, 1992, employer's Director of Administration sent a letter to claimant terminating his employment with employer, stating that the reason for termination was that the employer's liability carrier had excluded claimant from auto liability coverage due to claimant's driving record. On a Form TWCC-21 dated October 28, 1992, the carrier terminated benefits and disputed the claim stating that claimant had rejected workers' compensation coverage.

After the hearing, the record was held open to allow both carrier and claimant to brief the legal issues involved in this case. Both the carrier and claimant availed themselves of this opportunity to submit briefs.

The argument of the carrier, both at the hearing level and on appeal, has some appeal on its surface. Basically the carrier argues that the first issue to be decided is that of jurisdiction. The carrier then argues that the Commission lacks jurisdiction to determine this case because the claimant rejected coverage under the 1989 Act and thus his claim falls outside the 1989 Act, and the Commission's jurisdiction to administer the

1989 Act. The carrier goes on to cite authority for the proposition that jurisdiction cannot be created by agreement or estoppel based upon agreement. Southern Surety Co. v. Inabnit, 119 Tex. 67, 24 S.W.2d 375, (1930).

Carrier then bolsters its argument by pointing to the principle that payment of workers' compensation benefits will not estop a carrier from denying liability pending further investigation. Lopez v. Associated Employers Ins. Co., 330 S.W.2d 522, 523 (Tex. Civ. App.-San Antonio 1960, writ ref'd). Carrier also points to the underlying policy for this rule which is that to hold otherwise "manifestly discourage[s] prompt payments following injuries." Southern Underwriters v. Schoolcraft, 139 Tex. 323, 158 S.W.2d 991, 995 (1942).

Carrier contends that its failure to timely file a TWCC-21 is irrelevant because a TWCC-21 would need to be filed only when there is a contest of compensability, not a contest of jurisdiction. Carrier's argument that its failure to timely contest compensability cannot confer jurisdiction rests implicitly upon the doctrine that prior to reaching any other issue, any tribunal must first determine its jurisdiction.

What the carrier's argument fails to appreciate is that the issues of compensability and jurisdiction are not neatly divisible. The first step in determining the issue of jurisdiction is to find whether or not this claim is outside of the 1989 Act. To determine this, it is necessary to decide the question of whether the claimant rejected coverage under the 1989 Act.

Article 8308-3.08 of the 1989 Act provides in relevant part:

**Art. 8308-3.08. Employee election**

- (a) Except as otherwise provided by law, unless the employee gives notice as provided by Subsection (b) of this section, an employee of an employer waives the employee's right of action at common law or under any statute of this state to recover damages for personal injuries or death sustained in the course and scope of the employment.
- (b) An employee who desires to retain the common-law right action to recover damages for personal injuries or death shall notify the employer in writing that the employee does not want to be covered under this Act and retains all rights of under common law. The employee shall notify the employer not later than the fifth day after the date the employee begins the employment. . . ."

On its face the statute provides that an employee waives his common law rights, and thus elects to be covered by the 1989 Act, unless the employee gives written notice. Thus the statute raises a presumption that the employee is covered unless it is proven that the employee elected to retain his common law rights. Failure to raise this issue within the 60-day time limit prescribed by Article 8308-5.21 of the 1989 Act precludes the carrier from attempting to overcome this presumption after the time limit has run unless it can be shown that "there is a finding evidence that could not have been reasonably discovered earlier."

Article 8305-5.21 of the 1989 Act provides in relevant part:

- (a) . . . If the insurance carrier does not contest the compensability of the injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. . . . An insurance carrier shall be allowed to reopen the issue of compensability if there is a finding of evidence that could not have been reasonably discovered earlier.

In the present case the carrier failed to raise the defense that claimant rejected coverage under the 1989 Act within 60 days. The carrier had notice of claimant's injury on May 4, 1993, and did not raise the defense that claimant rejected coverage until October 28, 1993. Thus the carrier is precluded from reopening this issue unless "there is a finding of evidence that could not have been reasonably discovered earlier." The hearing officer finds in this case that the carrier could have reasonably discovered the form on which it alleges claimant rejected coverage prior to October, 1992, and there is ample evidence in the record to support this finding.

Further, this case has nothing to do with whether or not the carrier paid weekly benefits. It is not the payment of benefits which precludes the carrier from raising the defense it desires, but its failure to contest the issue within time as provided by the 1989 Act. If the carrier had both failed to pay benefits and to timely file its TWCC-21, it would still be faced with the same result except it would face exposure to being fined for failure to promptly pay. Article 8308-10.07(b)(14).

Finding no reversible error and sufficient evidence to support the findings and conclusions of the hearing officer, we affirm.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge